

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



ORIGINAC

76-7478

To be argued by  
JEANNE HOLLINGSWORTH

United States Court of Appeals  
FOR THE SECOND CIRCUIT

RANDALL BLACK, et al.,

*Plaintiffs-Appellants.*

against

ABRAHAM BEAME, et al.,

*Defendants-Appellees.*

BRIEF FOR DEFENDANTS-APPELLEES JOSEPH J.  
CHRISTIAN AND JOHN J. REICHARDT

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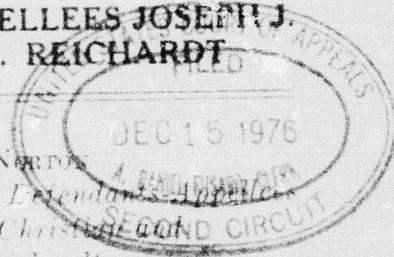
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**BRIEF FOR DEFENDANTS-APPELLEES JOSEPH J.  
CHRISTIAN AND JOHN J. REICHARDT**

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**Counter-Statement of the Case**

**Proceedings Below**

This is a civil rights action for declaratory and injunctive relief and damages for the alleged violation of constitutional rights under color of state law, brought by nine children of Frances Black, a tenant at Douglass Houses, a state-aided public housing project located on the West Side of Manhattan, by their attorneys and next friends, against the Mayor of the City of New York, the city Welfare Commissioner and numbers of his subordinate officials and staff, Joseph Christian as Chairman and John Reichardt as Manager of Douglass Houses, on behalf of the New York City Housing Authority (hereinafter "Authority"), Monsignor Edmund F. Fogarty, Administrator of the Mission of the Immaculate Virgin, and various of his subordinates. (A.\* 3-10, Complaints, Pars. 1, 2-27). The gravamen

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\*A.—Joint Appendix and appropriate page citation therein.

of the complaint is that defendants have followed a custom, pattern and practice of denying services to plaintiffs and their mother (who is not a party to the suit) whereby the family has been broken up and denied the right to live under one roof with their mother. (A. 3, 11-19, Complaint, Pars. 1, 2, 28-58). Four of plaintiffs, Randall Black (a/k/a Michael Black), Greta Black, Joseph Black and Corrine Black have been placed by their mother in foster care at the Mission of the Immaculate Virgin, Mount Loretto, Staten Island. (A. 4-5, 14, 15, Complaint, Pars. 3-6, 42, 45). The other five plaintiffs live with their mother at Douglass Houses. (A. 5-6, Complaint, Pars. 7-11).

As to defendants Christian and Reichardt, plaintiffs seek a preliminary and permanent injunction against the denial of adequate housing which would enable plaintiffs to live with each other and their mother, Frances Black (A. 21, Complaint, Wherefore Clause, Par. (e), and against continuing to provide plaintiffs with housing "in a manner accompanied by harassment, humiliation, intimidation and delay as set forth in this complaint;" (A. 21, Complaint, Wherefore Clause, Par. (f)).

In the court below defendants Christian and Reichardt made a motion for an order pursuant to Federal Rules of Civil Procedure, Rule 12 (b) (1), (6) and (7), dismissing the complaint as to them for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, or in the alternative, for failure to join Frances Black, the mother of plaintiffs, an indispensable party. (A. 50-51). Annexed thereto and not excluded by the court below is a factual affidavit by Samuel Granville, Director of Management of the Authority, and various exhibits pertaining to plaintiffs' mother Frances Black. (A. 52-66).

The court below held that there was standing and ripeness as to plaintiffs' claims, as they pertain to housing, (A. 77), denied the Authority's motion to dismiss for fail-

ure to join Frances Black as an indispensable party (A. 78-79), held that there is no constitutional obligation on the state to provide plaintiffs with housing benefits and that none may be created by inference and misdirection through the penumbral constitutional right to familial privacy (A. 85), and held that failure to provide the Black family an apartment of a particular size is not a constitutional deprivation. (A. 89). The court below further noted that plaintiffs cite no statutory entitlement to a larger apartment or to particular due process procedures in connection with the provision of public housing to them. (A. 90-92). As to plaintiffs' statutory claims, none of which specifically relate to housing, the Court below held that none of these statutes purport to create an individual right to have statutory policy "perfectly achieved or ever pursued in any particular manner". (A. 92-93). The complaint as to the statutory claims was found to be so vague and conclusory that it must be dismissed for legal insufficiency. (A. 93). The complaint was dismissed in its entirety as to all defendants for lack of subject matter jurisdiction. (A. 96). This appeal was timely filed by plaintiffs. (A. 97).

### The Facts

While it is the rule that, for purposes of a motion to dismiss, plaintiffs' statement of the facts in the complaint must be admitted as true, conclusions of law and argumentative and conclusory averments in the complaint are not so admitted. Moore's Federal Practice, 2d Ed. Vol. 2, pg. 2244; *Dwight v. United States*, 225 F. Supp. 933, 934 (N.D.N.Y. 1963), aff'd 328 F. 2d 973 (2d Cir. 1964); *Wise v. City of Chicago*, 308 F. 2d 365, 366 (7th Cir. 1962), cert. denied, 372 U.S. 944 (1963), *Oppenheim v. Sterling*, 368 F. 2d 516, 619 (10th Cir. 1966), cert. denied, 386 U.S. 1011 (1967), reh. denied 388 U.S. 925 (1967), reh. denied 389 U.S. 1059 (1968).

Plaintiffs make the conclusory allegation that defendants Christian and Reichardt, *inter alia*, have "engaged

in a custom, pattern and practice of unlawfully denying plaintiffs . . . services in their home in order to keep plaintiffs together as a family" (A. 11, Complaint, Par. 31). But factual material in the record, not excluded by the Court below, reveals that in 1968 Frances Black twice stated that she contemplated giving up her children for adoption. In 1970 she refused the services of a homemaker, and stated she planned to have her daughter Linda placed in a home. (A. 54-55).

As to a similar conclusory allegation that said defendants have "further engaged in a custom, pattern and practice of unlawfully denying and delaying welfare benefits and services to plaintiffs and to their mother, Frances Black, . . .". (A. 12, Complaint, Par. 33), factual material in the record, not excluded by the Court below, reveals that in January, 1971, Frances Black placed four children temporarily with the Queens Society for the Prevention of Cruelty to Children. She received assistance from Paul Pelletreau, a social worker from welfare stationed with a team at Douglass Houses, in placing LaFrances, her cerebral palsied daughter, in the Willowbrook School and in getting four children already placed in different agencies to be placed in the same agency. (A. 55, 66). Mr. Pelletreau reported on these and other activities in assistance to Frances Black and continued:

" . . . spoke with numerous agencies (B.C.W., St. Lukes (sic) community psychiatry, St. Lukes (sic) crisis intervention, Amsterdam W.C., Mission of Immaculate Virgin, Mt. Loretto, Legal Aid etc.) to try to pinpoint responsibility & get action for this family. *The present outlook for the family is very poor since there is very little strength in Mrs. Black, resources are few and problems are overwhelming.*" (A. 66) (emphasis supplied).

Although plaintiff's express a desire to be reunited with their mother throughout the complaint (A. 3-21), they

nowhere allege that their mother, Frances Black, has requested that they be returned to her. Factual material in the record, not excluded by the Court below, reveals that defendant John Reichardt, Manager of Douglass Houses where Mrs. Black resides, has not, since he became Manager at that project in 1973, received a request from Frances Black for a transfer. (A. 56). Plaintiffs allege that Frances Black decided to place plaintiffs Randall, Greta, Corrine and Joseph Black in foster care in January, 1971. (A. 14, Complaint, Par. 42).

During Mrs. Black's tenancy in public housing the composition of her household has fluctuated between 10 and 12 persons (A. 53, 61). In addition to her 12 children, who have from time to time resided with Mrs. Black, she presently has 3 of her grandchildren residing with her as well.\* (A. 56). Thus the "nuclear family", if reunited, would consist of 16 persons.

These facts are set forth in order to underscore the point that there is little factual or legal substance to the vague and conclusory allegations in the complaint that plaintiffs have been subjected to denial of services or to harassment.

## ARGUMENT

**The Court below properly found the housing claims advanced by plaintiffs to be legally insufficient.**

### Housing Claims Not Pressed On This Appeal

Plaintiffs make no reference in their brief in this Court to the housing claims set forth in the complaint. They advance a comprehensive service plan for the Black family formulated by Sarah Zweibel, a social worker. (Plaintiff's

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\* The Court below erroneously states that Frances Black has 15 children (A. 68) Michael and Michele, the twins, are also known as Randall and Janice, which might account for confusion as to numbers.

brief, hereinafter "P. Br." p. 6). They state that its principal ingredient would be the assignment of a family social worker whose specific task would be to aid Mrs. Black *in locating a new home*, as well as providing other assistance (P. Br. 6, Emphasis supplied). In her report, Sarah Zweibel states in reference to the proposed family social worker:

"She should have at her disposal a car, and her first priority ought to be to accompany Mrs. Black in an effort *to locate a house large enough for all the members of the family*—including those in placement." (P. Br. Exhibit A, p. 3 thereof. (Emphasis supplied.)

Implicit in all this is a recognition that an apartment in public housing may not be an ideal or even sufficient home for a "nuclear family" consisting of as many as 16 persons.

#### **Due Process has been Accorded on Apartment Transfer Requests**

In discussing the due process protections which must be afforded a public housing tenant who requests a transfer to larger quarters, the District Court cites 42 U.S.C. S.1437d(e)(3) (A. 91). The Court states: "The record does not indicate whether or not Mrs. Black's apartment is in a federally-subsidized building." (A. 91, n. 7). In fact, in the record, the Authority, in an unintentionally ambiguous statement, notes that Douglass Houses is a state-aided project owned and operated by the Authority. (A. 53, Par. 4). Since Douglass Houses is a project assisted by New York State and not the federal government, the federal regulation cited by the Court below is inapplicable.

The denial of a transfer to an Authority tenant is a determination reviewable in the Courts of New York State pursuant to McKinney's Consolidated Laws of New York, Article 78, Civil Practice Laws and Rules, Sec. 7801. Such a determination was upheld where the tenant requested a

transfer to be in the same building as her elderly mother. The transfer was denied in writing after administrative review of the tenant's request by the Authority. The court upheld the denial of the transfer as based on convenience rather than need. *Cajigas v. Christian* (Sup. Ct. N.Y. Co. 1974) Index No. 42059/74, J. Amsterdam, January 2, 1975.

The record makes it clear that Frances Black received a transfer from a 5½ to a 6 room apartment at Douglass Houses when her family residing with her increased from 10 to 12 persons. This is the largest size apartment available at Douglass Houses. (A. 53, 55, 59, 60). In 1967 and 1969 when Frances Black requested transfers, she was given the reasons for refusal. The first request, in 1967, for transfer to the Polo Grounds project was refused because all 6 and 7 room apartments there were being reserved for families displaced by model cities programs (a first priority). (A. 54). *Otero v. New York City Housing Authority*, 484 F. 2d 1122, 1131-1132 (2d Cir. 1973). The second request, in 1969, for transfer based on "ease reasons" that Frances Black and her family were being harassed by fellow tenants, was investigated thoroughly by the Authority and found to be baseless. Mrs. Black was advised of this in a letter from Chief Manager, Abe M. Berson, who advised her that if she had any further questions regarding her transfer request, she could see a member of the management staff at Douglass Houses, who would be pleased to assist her. (A. 54, 63). Defendant John Reichardt, Manager of Douglass Houses since 1973, has never received a transfer request from Frances Black. (A. 56). Mrs. Black has been given the reasons for past rejections of transfer requests, and an opportunity for a personal interview. (A. 92).

**Frances Black, mother of plaintiffs, is indispensable as to public housing relief**

In denying the Authority's motion to dismiss pursuant to FRCP 12(b)(7) for failure to join an indispensable

party, Frances Black, mother of plaintiffs, the Court below noted:

"At any rate, there is no indication that Mrs. Black's joinder would not be possible . . ." (A. 79)

However, that may be, Frances Black is not a party to this proceeding, and she is the only person who may properly make a transfer request as to public housing, under the governing constitutional, statutory and regulatory scheme.

The Constitution of the State of New York, Article XVIII, Section 1 (McKinney's Consolidated Laws of New York) provides:

"Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary area, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto." (Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938).

Thereafter the Public Housing Law was enacted by the legislature in L. 1939, c.808 (McKinney's Volume 44-A). This statute declares it to be the policy of the State of New York to provide adequate, safe and sanitary dwelling accommodations for persons of low income, to be accomplished by the investment therein of public and private funds at low interest rates. Section 2, Public Housing Law (hereinafter PHL).\*

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• § 2. Policy of state and purpose of chapter

It is hereby declared that in certain areas of cities, towns and villages of the state there exist insanitary and substandard housing

*(footnote continued on following page)*

The terms "persons of low income" and "families of low income"

"mean persons or families who are in the low income groups and who cannot afford to pay enough to cause private enterprise in their municipality to build a sufficient supply of adequate, safe and sanitary dwellings." PHL Section 3 subd. 18.

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*(footnote continued from preceding page)*

conditions owing to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air and space, insanitary design and arrangement or lack of proper sanitary facilities; that these conditions are chiefly in areas where low rent dwellings prevail and that such conditions and dwellings are a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of this state; that there is not an adequate supply of adequate, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state; that these conditions inflict blight upon the economic value of large areas, impair private investments and the source of public revenues; that these conditions cannot be remedied by the ordinary operation of private enterprise; that these conditions require that provision be made for the investment of public and private funds at low interest rates in low rent housing and the acquisition at fair prices of adequate parcels of property, the gradual demolition of existing insanitary and unsafe housing and the construction of new housing facilities, under public supervision in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay; that loans and subsidies by the state and its subdivisions are necessary for such purposes; that the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas or the providing of adequate, safe and sanitary low rent housing accommodations in these areas and elsewhere for persons and families of low income, or both of these, are public uses and purposes for which public money may be spent and private property acquired; that these conditions require the creation of the agencies and instrumentalities hereinafter prescribed, which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions herein-after enacted is hereby declared as a matter of legislative determination.

The Authority is a public corporation which is a corporate governmental agency organized to accomplish the purposes specified in article eighteen of the state constitution. PHL Section 3 subd. 2, 401. The Authority has the power to select tenants for its projects, subject to loan or subsidy contracts with the financing governmental level, and to make rules and regulations not inconsistent with the public housing law. PHL Sections 156, 37 subd. 1(w).

Pursuant to its rule-making power, the Authority has promulgated a management directive governing admission to public housing—GM 1810. This regulation states that it is the policy of the Authority to select families for admission from among eligible applicants in accordance with definitive and objective standards based upon urgency of housing need. Under this regulation, with exceptions not here applicable pertaining to elderly and disabled single persons, an applicant to be eligible must be a *family* which

"consists of two or more persons constituting a cohesive and stable family".

The more detailed instructions set forth in the NYCHA Management Manual, Chapter III pertaining to tenant selection state in Par. V.B.:

**1. Definition of Family**

"The term 'family' included the following:

b. A cohesive natural family consisting of two or more persons related by blood, marriage or adoption, and in addition may include dependent relatives

"In order to qualify as a 'family' under b. or c. above, the history and cohesiveness of the members constituting the family must be such that, for the purpose of size of apartment to be allocated and income eligibil-

ity, a reasonably definitive determination can be made regarding persons who will be residing in the apartment."

A management Standard Procedure (SP) on the subject of Execution of Tenant Leases, SP 040:50:4 provides:

#### "IV. SIGNATURES REQUIRED

##### "A. On Part of Tenant

"It is Authority policy that the lease shall be prepared in the name of the husband and wife and both husband and wife shall sign the lease.

"At least one person who signs the lease shall be a member of the family who is under some legal or moral obligation to support and maintain the family. Preferably, such person should be a wage earner. When the basic family composition consists of an aged, unemployable parent or parents and an adult child or children, the lease is to be executed in the name of a parent and an employable adult member of the family.

"When both tenants are minors . . . , the signature (and address) of at least one parent on the lease should be obtained in addition to those of the minor tenants."

The constitutional, statutory and regulatory scheme, taken together, show a clear policy intent that the Authority shall have a contractual relationship via a lease with a tenant, usually and preferably an adult parent or parents. The Authority has such a relationship in the instant case only with Frances Black, not a party herein, via a lease agreement executed by her in 1968. (A. 60).

This is not to be construed as an invitation to remand the instant case to the District Court for the joinder of

Frances Black as a party. The Authority has taken no appeal from the judgment below and respectfully relies thereon, and the opinion of Judge Pollack, as correctly stating the law as to issues regarding public housing raised in the complaint. That judgment dismissed the complaint for lack of subject matter jurisdiction, in its entirety as to all defendants. (A. 96). There was no error therein, and the judgment should be affirmed in all respects.

### CONCLUSION

**The judgment of the District Court, which dismissed the complaint for lack of subject matter jurisdiction, in its entirety as to all defendants, should be affirmed in all respects.**

Respectfully submitted,

EDWARD W. NORTON  
*Attorney for Defendants-Appellees*  
*Joseph J. Christian and*  
*John J. Reichardt*

Dated: New York, New York, December 20, 1976.

JEANNE HOLLINGSWORTH  
*of Counsel*

(60819)

United states Court of appeals  
for the Second Circuit

Randall Black, et al.,

Plaintiffs-Appellants,

against

Abraham Beame, et al.,

Defendants-Appellees,

AFFIDAVIT  
OF SERVICE

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place, Bronx, New York. That on December 15, 1976 , he served 2 copies of Brief on

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by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Sworn to before me this  
15 day of December , 19 76.

*John V. DiSantis*  
JOHN V. DISSANTIS  
Notary Public, State of New York  
Reg. No. 00032380  
Qualified in Nassau County  
Commission Expires March 30, 19 77